

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: September 24, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Stiller, Crawford) *JSC*
Division of Accounting and Finance (Sewards, Mouring) *ALM*

RE: Docket No. 20200178-GU – Petition for approval to track, record as a regulatory asset, and defer incremental costs resulting from the COVID-19 pandemic, by Peoples Gas System.

AGENDA: 10/06/20 – Regular Agenda – Proposed Agency Action – Reconsideration requested on the Commission’s own motion – Participation is at the Commission’s discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Please place this recommendation to follow the recommendation in Docket No. 20200151-EI on the Agenda.

Case Background

On July 2, 2020, Peoples Gas System (Peoples or Company) filed a petition (Petition) for approval to track, record as a regulatory asset, and defer incremental costs resulting from the COVID-19 pandemic. Peoples has requested deferral of incremental bad debt expense and safety-related costs attributable to COVID-19. Given the ongoing nature of the COVID-19 pandemic, the total extent of Peoples’ COVID-19-related costs is not known at this time. Commission consideration of the potential recovery of the regulatory asset will be addressed in a future proceeding. The Office of Public Counsel (OPC) filed a notice of intervention, which was acknowledged by Order PSC-2020-0229-PCO-GU on July 9, 2020.

Staff filed its recommendation regarding Peoples' Petition on August 6, 2020, recommending approval of the requested regulatory asset and noting that the approval would issue as a procedural order. The Commission considered the Petition at its August 19, 2020, Agenda Conference and approved staff's recommendation. The Commission memorialized its approval in Order PSC-2020-0305-PCO-GU (Order), entered on September 4, 2020, which allowed Peoples to establish a regulatory asset to record costs incurred due to COVID-19. The Order was entered as a procedural order, not as proposed agency action (PAA), and contained the following language:

A substantially affected party's point of entry to request an evidentiary hearing before this Commission will be afforded in such a future proceeding addressing cost recovery of the regulatory asset.

Order at 2.

The Notice of Further Proceedings or Judicial Review attached to the Order did not provide the opportunity for substantially affected persons to request a hearing. It did advise parties who are adversely affected by the Order of the opportunity to request reconsideration under Rule 25-22.0376, Florida Administrative Code (F.A.C.). No reconsideration was timely requested with respect to the Order issued in this docket.

The action taken with respect to the regulatory asset requested in this docket was substantially identical to the action taken with respect to a similar request for a COVID-19 related regulatory asset by Gulf Power Company (Gulf) in Docket No. 20200151-EI, *In re: Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company*. OPC timely filed a motion for reconsideration and appeal with respect to the procedural order that issued in the Gulf regulatory asset docket.¹ Staff's recommendation regarding OPC's motion for reconsideration in the Gulf docket is also scheduled to be heard at the October 6, 2020 Agenda Conference. Consistent with staff's recommendation in Docket No. 20200151-EI to grant reconsideration and reissue Order No. PSC-2020-0262-PCO-EI as a PAA order, staff is recommending that the Commission reconsider on its own motion the issuance of Order No. 2020-0305-PCO-GU in this docket, vacate the procedural Order, and reissue the Order as proposed agency action.

The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 366.06, Florida Statutes (F.S.).

¹ Order No. PSC-2020-0262-PCO-EI (Order), issued July 27, 2020, in Docket No. 20200151-EI, *In re: Petition for approval of a regulatory asset to record costs incurred due to COVID-19, by Gulf Power Company*.

Discussion of Issues

Issue 1: Should the Commission reconsider, on its own motion, the issuance of Order No. PSC-2020-0305-PCO-GU as a procedural order?

Recommendation: Yes. The Order overlooked a point of law affecting notice and the point of entry for a substantially affected person to challenge the establishment of a regulatory asset. On its own motion, the Commission should vacate Order No. PSC-2020-0229-PCO-GU and reissue it as proposed agency action (PAA). (Stiller, Crawford)

Staff Analysis:

Standard of Review

The appropriate standard of review for reconsideration is whether a point of fact or law was overlooked or that the Commission failed to consider in rendering its Order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981).

The doctrine of administrative finality provides that there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein. A decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest. *Florida Power Corp. v. Garcia*, 780 So. 2d 34 (Fla. 2001); *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966).

However, the Florida Supreme Court has also found that the Commission has the inherent power and the statutory duty to correct errors in its orders to protect the interests of the public. *Reedy Creek Utilities Co. v. FPSC*, 418 So. 2d 249 (Fla. 1982). For example, in *Reedy Creek*, the Court affirmed that the Commission correctly amended an erroneous order, two and half months after its issuance, where the appellant did not change its position during the lapse of time between orders, and suffered no prejudice as a consequence. *Reedy Creek*, 418 So.2d at 253; *see also Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966) (“We have no doubt that such powers [to regulate public utilities] may, in proper instances, be exercised on the initiative of the commission.”).

Analysis

The question of whether the Order is PAA or procedural depends on the nature of the action taken by the Commission. “[A]n agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.” *Capelletti Bros., Inc. v. Dept. of Transp.*, 362 So.2d 346, 348 (Fla. 1st DCA 1978). This point of entry is case and agency specific. “An agency normally has some discretion in determining at what point ‘the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business’ crystallize into ‘agency action’ and so necessitate the offering of a point of entry.” *Global Tel*

Link Corp. v. Dept. of Corrections, 2013 WL 5955693, *13 (DOAH Recommended Order Nov. 1, 2013) (citing and quoting *Capeletti Bros.*, 362 So. 2d at 348)).

When previously presented with petitions seeking approval of regulatory assets, the Commission has addressed them by entering PAA orders.² These prior regulatory asset orders are similar in many respects to the Order. All of them contain an express reservation of the right for future Commission review of the reasonableness of expenses similar to the one included in the Order.³ While those prior orders were considered on more detailed requests than the one made in the limited petition that commenced this docket, the underlying request to establish a regulatory asset is the same and staff believes the precedent of treating approval as PAA applies equally.

The phrase in the Order here for which staff urges reconsideration expressly allows a future challenge by a substantially affected person (“A party’s point of entry to request an evidentiary hearing before this Commission will be afforded in such a future proceeding addressing cost recovery of the regulatory asset”) and is substantively different from prior Commission orders on regulatory assets (“Approval of a regulatory asset does not prohibit the Commission from reviewing the amount for reasonableness in future rate proceedings”). In previous PAA orders establishing regulatory assets, parties were not foreclosed from challenging the creation of the regulatory asset itself, as was the case in this Order and the Gulf regulatory asset in Docket No. 20200151-EI.

Importantly, litigation in the future over amounts, recovery method, or the scope, period, types, or subsets of allowable expenses does not address the appropriateness of the creation of the regulatory asset in the first instance, which is the subject of this proceeding. For example, in *General Development Utilities, Inc. v. Department of Environmental Regulation*, the First District considered whether a letter that informed its recipient of an agency “decision” to establish a zero waste load allocation provided a point of entry even though the letter stated that a challenge could be brought to this issue in a later permit proceeding. 417 So. 2d 1068 (Fla. 1st DCA 1982). The court wrote as follows:

We pointed out in *Capeletti Brothers, Inc. v. State Department of Transportation*, 362 So. 2d 346, 348, (Fla. 1st DCA 1978) that “an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal

² See, e.g., Order PSC-13-0381-PAA-EI, issued August 15, 2013, in Docket No. 130091-EI, *In re: Petition of Progress Energy Florida, Inc. to approve establishment of a regulatory asset and associated three-year amortization schedule for costs associated with PEFs previously approved thermal discharge compliance project*; Order PSC-12-0600-PAA-EI, issued November 5, 2012, in Docket No. 120227-EI, *In re: Petition for approval of recognition of a regulatory asset and associated amortization schedule by Florida Public Utilities Company*; and Order PSC-08-1616-PAA-GU, issued November 23, 2008, in Docket No. 080152, *In Re: Petition for Approval of Recognition of a Regulatory Asset under Provisions of Statement of Financial Accounting Standard (SFAS) No. 71, by Florida City Gas*.

³ Order PSC-13-0381-PAA-EI (“The approval to record the regulatory asset for accounting purposes does not limit our ability to review the amounts for reasonableness in the ECRC.”); Order PSC-12-0600-PAA-EI (“Further, we find that the approval to record the regulatory asset for accounting purposes does not limit our ability to review the amounts for reasonableness in future proceedings in which the regulatory asset is included.”); Order PSC-08-1616-PAA-GU (“Finally, we find that the approval to record the regulatory asset for accounting purposes does not limit the our ability to review the amount for reasonableness in future rate proceedings.”).

proceedings under section 120.57.” Now we find it necessary to add a postscript: simply providing a point of entry is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a 120.57 hearing. The opportunity afforded GDU in this instance does not meet this standard.

Id. at 1070. Because the letter stated that “the Department has conducted water quality studies and adopted the results of those studies,” the court found the agency had “taken a position, reduced it to writing, and disseminated it to the affected party who must now submit a proposed schedule for compliance, or hazard nonrenewal of its permits.” *Id.*

Conclusion

As discussed in staff’s recommendation in Docket No. 20200151-EI, OPC persuasively argues that the establishment of a regulatory asset may affect a person’s substantial interests because it provides for the immediate accounting treatment of certain expenses and the related accrual of carrying costs. A person adversely affected by such a decision should have the present opportunity to challenge the establishment of this accounting treatment and the definition of its terms. Being able to address the subsequent cost recovery requested pursuant to an established regulatory asset does not afford an adequate opportunity to address the appropriateness of the regulatory asset itself. By issuing as a procedural, rather than PAA, order, the Commission inadvertently overlooked a point of law in making its decision: to afford an opportunity for an adversely affected person the opportunity to request an administrative hearing regarding the creation of the Peoples’ regulatory asset, consistent with the requirements of Section 120.569, F.S., *Decisions which affect substantial interests*. Accordingly, staff recommends that the Commission should reconsider, on its own motion, the issuance of Order No. PSC-2020-0305-PCO-GU as a procedural order.

Staff recommends that appropriate action the Commission should take on reconsideration is that the Commission vacate the procedural Order and reissue it as PAA. *See Sclease v. Constr. Indus. Licensing Bd.*, 881 So. 2d 98, 98 (Fla. 1st DCA 2004) (“an agency has authority to vacate and reenter otherwise final orders in order to avoid due process problems”). Staff believes that vacating and reentering the Order as PAA will require only two, non-substantive modifications to the Order. First, the appropriate PAA Notice of Further Proceedings or Judicial Review should be substituted for the Notice applicable to procedural orders that was attached to the Order. Second, the phrase on page 2 regarding the ability for substantially affected persons to bring a later administrative challenge⁴ should be omitted.

⁴ “A substantially affected party’s point of entry to request an evidentiary hearing before this Commission will be afforded in such a future proceeding addressing cost recovery of the regulatory asset.” Order at 2.

Issue 2: Should this docket be closed?

Recommendation: If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, a Consummating Order should be issued and the docket should remain open for the purpose of filing monthly status reports. (Stiller)

Staff Analysis: If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, a Consummating Order should be issued. The docket should remain open for the Company to file its monthly reports.